2017/14

Dansk Industri revisited: the Danish Supreme Court overrides the EU Court of Justice (DE)

CONTRIBUTOR Christian K. Clasen*

Summary

On 6 December 2016, the Danish Supreme Court delivered its long-awaited judgment on the case of Ajos, addressing the issue of whether a private employer was entitled to refuse to make a redundancy payment in reliance on the former section 2a(3) of the Danish Salaried Employees Act or whether the general principle against discrimination on grounds of age needed to take precedence. It concluded that the employer was entitled to refuse to pay.

Facts

Under the former section 2a of the Salaried Employees Act, salaried employees (white-collar workers) were not entitled to redundancy pay if they were entitled to an old-age pension payable by the employer on the effective date of termination. In *Ole Andersen* (C-499/08), however, the ECJ held that this principle was incompatible with the EU law principle of non-discrimination on grounds of age in the situations where the employee did not intend to retire.

Until the amendment of section 2a of the Salaried Employees Act on 1 February 2015, this meant that, in principle, Danish employers were not required under national law to pay redundancy where an employee was entitled to a pension payable by the employer on the effective date of termination. However, based on *Ole Andersen*, it was already clear that this state of affairs was incompatible with EU law in certain situations.

In the case at hand, Ajos, this problem was amplified as a departing employee argued in an action against a private employer that although he was not entitled to redundancy pay under the applicable provision of the Salaried Employees Act, he was entitled to redundancy pay on the strength of the EU law principle of non-discrimination on grounds of age.

The case ended up before the Danish Supreme Court, which decided to refer it to the ECJ for a preliminary ruling. In its order for reference, the Supreme Court stated its view that it would not be possible to interpret section 2a(3) of the Salaried Employees Act in conformity with EU law and that, in the Supreme Court's opinion, the situation was therefore *contra legem*. The Supreme Court asked the ECJ whether it was consistent with EU law to give precedence to the principle of legal certainty and the related principle of the protection of legitimate expectations over the general EU principle prohibiting discrimination on grounds of age. Before the ECJ, the Danish Government argued in relation to the latter that in its view, it should be compatible with EU law – in specific situations – to give preference to the principle of legal certainty and the related principle of the protection of legitimate expectations over the general EU principle prohibiting discrimination on grounds of age.

The ECJ delivered its ruling on 19 April 2016 (*Rasmussen*, C-441/14), holding that the requirement for an EU compliant interpretation means that the national courts are required to depart from consistent case law on how to interpret a national provision and that, in the ECJ's opinion, the Supreme Court would err if it based its decision on the premise that the existing section 2a(3) of the Salaried Employees Act could not be interpreted in conformity with EU law. The ECJ went as far as to hold that in a situation in which interpretation of a national provision in conformity with EU law was impossible, the national court would be required to refrain from applying the provision.

The battles lines thus drawn, the Supreme Court's judgment has been much anticipated.

Judgment

The court was set with an expanded bench of nine judges, who all found that the case demonstrated a *contra legem* situation and that according to Danish rules of legal interpretation it was not possible to interpret sec-

* Christian K. Clasen is a partner at Norrbom Vinding, Copenhagen.

doi: 10.5553/EELC/187791072017002002005

tion 2a of the Salaried Employees Act in conformity with EU law. After making this opening statement the Supreme Court divided into a split decision.

By an 8-to-1 majority, the Supreme Court ruled that with regard to a dispute between two private parties, the Act on the Accession of Denmark to the European Union provides no authority for allowing the general principle prohibiting discrimination on grounds of age to override the former provision in section 2a(3) of the Salaried Employees Act.

The majority noted that the general principle prohibiting discrimination on grounds of age as laid out in *Mangold* (C-144/04), *Kücükdeveci* (C-555/07) and *Rasmussen* (C-441/14) was not specifically mentioned in the wording of TFEU. Therefore, the general rule was most naturally to be interpreted as upholding an unwritten general principle which was applicable at treaty level – and that this general principle can be inferred from Article 6(3) of the TFEU, which says: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The Supreme Court held that the Danish Act on the Accession of Denmark to the European Union did not foresee a situation where such a general principle – not enshrined in the wording of the Treaty – should be given precedence over Danish law which was incompatible with this principle. The Danish Supreme Court relied on the preparatory work of the Act on the Accession of Denmark to the European Union and found that general principles inferred from Article 6(3) had not been made immediately applicable in Denmark.

In conclusion, the majority judgment noted that the Supreme Court would be acting *ultra vires* if it were to refrain from applying the provision of the Salaried Employees Act in a situation such as this.

Accordingly, the Supreme Court ruled in favour of the employer, who was entitled to refuse to pay in reliance on section 2a(3) of the Salaried Employees Act.

The dissenting judge found that since the judgment in *Mangold* (C-144/04) was given before the latest amendment of the Act on the Accession of Denmark to the European Union, the general principle prohibiting discrimination on grounds of age was a well-known principle, and since the Danish legislator did not make a reservation to this principle in the Act, the judge found that the Act provided sufficient authority to give the principle immediate effect in Denmark.

Commentary

In Denmark where the European Union and Denmark's membership of the European Union is a frequently debated topic, it has been surprising to see how little media attention the judgment has given rise to. The Supreme Court's judgment is without any doubt a landmark judgment in relation to drawing the jurisdictional lines between the ECJ and the Danish courts.

The point in time in which this judgment was made is also interesting. In recent years, former presidents of the Danish Supreme Court have sometimes expressed scepticism about the ECJ's legal interpretations. The judgment in the case at hand is already causing a similar reaction by some lawyers.

In Danish jurisprudence, the judgment has given rise to a discussion about the legal system in Denmark. Traditionally, Denmark has subscribed to the dualistic theory which says that national and international law are two separate systems and the validity of international law is derived from national law. This is in contrast to the monistic theory, which has it that national and international law are considered to be one legal system. With the Supreme Court's judgment in this case the judiciary in Denmark has sent a clear message that Denmark subscribes to the dualistic theory. Therefore, it is a matter for the Danish legislator to provide a legal basis in the Act on the Accession of Denmark to the European Union if unwritten general principles of EU law are to have horizontal effect in Denmark.

From an employment law perspective, it has now been established by the Supreme Court that in an employer/employee relationship where the employer is a private business, employees are not entitled to rely on general principles of EU law which are not enshrined in the EU treaties if the state of the law in Denmark is clear and does not allow for an EU-compliant interpretation. As mentioned, whether this legal status is changed or remains the same, is a political question.

Finally, as mentioned at the beginning of this case report, the Salaried Employees Act was amended in 2015. Thus, the employment law perspective on this judgment is therefore mostly of historical interest. The judgment will, and already does, however, attract great interest in terms of constitutional law and EU law, and it will be interesting to see whether the judgment gives rise to greater debate on the relationship between the national courts of the EU member states and the ECJ.

Comment from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): How to interpret incompatible domestic legislation in a

doi: 10.5553/EELC/187791072017002002005

way that does not undermine EU protections is an issue that has also perplexed UK courts, most commonly in cases about holiday entitlement under the *Working Time Directive*. Various ECJ decisions about holiday and holiday pay entitlement when the employee is off sick, such as *Stringer and others – v – HM Revenue & Customs; Schultz-Hoff – v – Deutsche Rentenversicherung Bund* [2009] IRLR 214 (ECJ) and *Pereda – v – Madrid Movilidad SA* [2009] IRLR 959 (ECJ), have interpreted the directive in a way which is, on the face of it, incompatible with the UK implementation of the EU law. In particular, the *Working Time Regulations 1998 ('WTR')* do not permit leave to be carried over from one holiday year to the next, even if the employee was unable to take holiday due to sickness; a position incompatible with *Stringer* and *Pereda*. The UK courts have been surprisingly willing to read words into the UK law, effectively rewriting it, in order to make it compatible with EU law. So, in the case of *NHS Leeds – v – Larner [2012] IRLR 825* the Court of Appeal held that, in order to interpret the *WTR* consistently with the directive, regulation 13(9) should be read as including the words in bold below:

> *"Leave to which a worker is entitled under this regulation may be taken in instalments, but – (a) it may only be taken in the leave year in respect of which it is due,* ***save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave***".

On the face of it, this additional wording contradicts the letter of the UK law, however, the courts have been prepared to do so in order to give effect to the wording and purpose of the directive. As the Danish Supreme Court recognised, such judicial rewriting of the law gives rise to issues about legal certainty, which the courts tend not to address in their decisions.

Subject: Age discrimination

Parties: DI acting for Ajos A/S – v – The estate of A

Court: *Højesteret* (Supreme Court)

Date: 6 December 2016

Case number: 14/2014

Hard Copy publication: Not yet available

Internet publication: http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Pages/Therelationshipbetween EUlawandDanishlawinacaseconcerningasalariedemployee.aspx

doi: 10.5553/EELC/187791072017002002005